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In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF THE NAVAJO NATION OIL AND GAS CO., INC., AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The Navajo Nation suffers from a lack of roads. Historically, the states ignored the infrastructure needs of the Navajo Indian country, believing that the satisfaction of these needs was a purely federal function. *See Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 690-01 & n.17 (1965). The federal government's commitment to providing roads in Navajo Indian country has wavered, as well. *See, e.g.*, 95 Cong. Rec. 10,644 (1949) (quoting 1937 edict of Commissioner of Indian Affairs John Collier, establishing 2,935,000 acres of the Navajo

reservation as a roadless area). Thus, in 1975 Navajo Indian country had 60 miles of paved roads per 1000 square miles, compared with 154 miles in comparable rural areas in the Southwest. United States Comm'n on Civil Rights, *The Navajo Nation: An American Colony* 41 (1975). The disparity is worsening.[1]

In seeking to remedy its infrastructure deficit, the Navajo Nation applied for and received funding under the Community and Economic Development Grant Program of the Bureau of Indian Affairs. This program sought to enable Indian tribes to achieve tribal "self-reliance." *See* 57 Fed. Reg. 6122 (Feb. 20, 1992). The grant was used to determine the feasibility of a vertically integrated oil and gas company and, if feasible, to establish and operate such a company as an instrumentality of the Navajo Nation. Concurrently, Congress sought specifically to encourage the formation of vertically integrated tribal energy ventures in the Energy Policy Act of 1992. *See* 25 U.S.C.A. § 3503 (1994 Supp. Pamph.).

The Navajo Nation determined that a vertically integrated oil and gas company was feasible and formed its wholly owned Navajo Nation Oil and Gas Company by resolution in 1993[2] which, *inter alia*, establishes that the Company is an instrumentality of the Navajo Nation, requires that all shares of stock in the Company be held by the Navajo Nation, and requires that all dividends and

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[1] Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 Univ. of New Mexico L. Rev. 275, 278 & n.9 (1991).

[2] Resolution no. CN-82-93 (Nov. 18, 1993). A certificate of incorporation was then issued under the Navajo Corporation Code. *See Lender Recourse, supra* n.1, at 301-304.

distributions of profit be devoted exclusively to essential governmental services.

The Navajo Nation created the Company in order to participate in all aspects of the oil and gas industry within Navajo Indian country, including the exploration and production of crude oil and natural gas, refining and manufacturing activities, and the wholesale and retail distribution of products manufactured by the Company from Navajo crude. In developing its business plans and investment strategy, the Navajo Nation and its Company have relied on the prior decisions of this Court defining the strict limitations on direct state taxation of Indian tribes within Indian country. The Navajo Nation Oil and Gas Company is therefore directly interested in the issues raised in this proceeding. Any departure from the clear standards established by *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); and the related decisions of this Court would undermine the economic development plans of the Navajo Nation and would subject the Nation and its Company to unnecessary and wasteful litigation.

SUMMARY OF ARGUMENT

If, as the Court of Appeals held, Oklahoma's fuel taxes are imposed on the tribal retailer, they are invalid unless Congress has authorized such state taxation of an Indian tribe in unmistakably clear terms. The only act of Congress mentioned by the Oklahoma Tax Commission here is section 10 of the Hayden-Cartwright Act, 4 U.S.C.

§ 104 (1988). This provision and its legislative history contain not one mention of Indian tribes or tribal enterprises, and no hint that states could tax them. Thus, this case is controlled by *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); and *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992).

As a substitute for express congressional authority for its taxes, the Commission seeks to engage in a balancing of interests, although such balancing is only required when the legal incidence of the tax is on non-Indians. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). Moreover, its balancing of interests contorts beyond recognition the "reservation value" test.

The legal incidence test established by this Court in numerous decisions has historic significance, firm constitutional moorings, and immense practical value. The reservation value concept, as explained by this Court, serves important federal and tribal interests in promoting tribal self-determination and economic development, in fostering job creation in Indian country, in preserving the sovereign-to-sovereign relationship of tribes with the federal Government, and in honoring the constitutional framework which leaves Indians in Indian country free from state jurisdiction. These bedrock principles of federal law should not be abandoned when Oklahoma's problems could be resolved by minor amendments to its tax laws.

ARGUMENT

I. THIS COURT'S REQUIREMENT THAT ONLY CONGRESS MAY AUTHORIZE DIRECT STATE TAXATION OF INDIANS WITHIN INDIAN COUNTRY IS BASED ON FUNDAMENTAL CONSTITUTIONAL PRINCIPLES AND SOUND PUBLIC POLICY.

The Tenth Circuit's holding on federal preemption of the Oklahoma motor fuel taxes represents a straightforward and unremarkable application of this Court's precedents. This Court has consistently held that "[i]n the special area of state taxation" the legal incidence of a state tax may not be directly imposed on an Indian tribe or its members as to a transaction within Indian country unless Congress has authorized that tax in unmistakably clear language. *Blackfeet Tribe*, 471 U.S. at 765; *Cabazon Band*, 480 U.S. at 215. See also *Department of Tax. & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. ___, 114 S. Ct. 2028, 2035 (1994); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. ___, 113 S. Ct. 1985, 1991 (1993); *County of Yakima*, 502 U.S. at 258; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162-64 (1980); *Bryan*, 426 U.S. at 377; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973). The amicus brief filed in this matter by the States of South Dakota, California, Louisiana, Mississippi, Montana, Nevada, North Dakota, Oregon, Utah, Wisconsin and Wyoming correctly describes this rule of law as one of the "bedrock Indian law preemption principles" established by this Court. States' Amicus Brief at 2.

The Commission, on the other hand, asks this Court to abandon the bedrock principle of *Blackfeet Tribe* on the purported grounds that the principle is a meaningless formalism. The Commission asks this Court to sanction, for the first time in the Court's history, direct state taxation of an activity of an Indian tribe taking place within Indian country, even though Congress has not clearly and unmistakably authorized that state taxation. The Commission asks this Court to abandon the historic Indian exemption from direct state taxation simply because the tribal seller of motor fuel may be able to pass the state tax on to non-Indian consumers of the fuel. In short, the Commission would consign the viability of the historic Indian tax exemption to the vagaries of the marketplace, rather than to the considered political acts of Congress.

The bedrock principle that Congress, and only Congress, has the power to authorize direct state taxation of Indian activity and property within Indian country is not a mere formalism. That principle is derived from the Constitution itself. The Constitution vests the federal government, not the states, with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; *Blackfeet Tribe*, 471 U.S. at 764. The exemption of Indian tribes and their members from direct state taxation is a corollary of that fundamental division of authority in the Constitution. *Id.* While the theoretical basis for this tax exemption has changed over time, this Court has never wavered from the basic proposition that, absent unmistakably clear congressional sanction, direct state taxation of Indian tribes and their members within their Indian country is an

unjustifiable interference with the special sovereign status of the Indian tribes in the federal structure of government.

The Tenth Circuit's refusal to engage in a balancing test of tribal and state interests when the legal incidence of the state tax falls directly on the tribe or tribal members is entirely consistent with the precedents of this Court. During the years after the *McClanahan* decision, states raised a wide variety of arguments seeking to avoid the requirement that only Congress may lift the traditional Indian exemption from direct state taxation. This Court rejected all those attempts. In 1987 the Court gave clear notice that the issue had been laid to rest:

> We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.

Cabazon Band, 480 U.S. at 215 n. 17.

In other words, it is not necessary to prove in each case that direct state taxation of Indians within Indian country will in fact interfere with reservation self-government in a tangible way. Direct state taxation of Indians within Indian country can be consistent with the plenary authority of the federal government over Indian affairs only if Congress has affirmatively and unmistakably authorized the state tax. *Id.*

The tax exemption recognized in *McClanahan* and *Blackfeet Tribe* derives from the special preemption standards that give effect to the plenary and exclusive power of the federal government to deal with Indian tribes and to protect Indians and their property from interference by the states. *Bryan*, 426 U.S. at 376 n. 2. Subjecting Indian tribes and tribal members to direct state taxation would have devastating impacts on tribal governments. *Id.* at 389 n. 14.

In the context of civil regulatory authority, the application of state law within Indian country does not offend federal law unless there is some interference with reservation self-government. Thus, each application of state law must be evaluated in a particular factual context in order to identify any potential interference with tribal self-government. *See Rice v. Rehner*, 463 U.S. 713, 719 (1983). The Court has expressly *rejected* the need for this case-by-case evaluation in the context of state taxation:

> In the area of state taxation, however, Chief Justice Marshall's observation that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L.Ed. 579 (1819), has counseled a more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it," we have held, a State is without power to tax reservation lands and reservation Indians.

County of Yakima, 502 U.S. at 258, *quoting Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

The Commission concedes that states may not impose taxes directly on the United States, without regard to the ultimate economic burden of the tax. Pet. Br. at 31 n. 16. Yet it asks the Court to apply a less protective

standard of review on state attempts to impose taxes directly on Indian tribes and members. This Court has already rejected the idea proposed by the Commission. The decision in *Blackfeet Tribe* "turned on the rule that Indian tribes, like the Federal Government itself, are exempt from direct state taxation and that this exemption is 'lifted only when Congress has made its intention to do so unmistakably clear.' " *Cotton Petroleum*, 490 U.S. at 183 n. 14, quoting *Blackfeet Tribe*, 471 U.S. at 765. The same principles of federal supremacy that preclude direct state taxation of the United States preclude direct state taxation of Indian tribes and tribal members within Indian country.

The *per se* rule of *Blackfeet Tribe* has considerable practical justification as well. This Court has struggled over many years to develop a coherent doctrine defining the scope of the Indian immunity from state taxation, in the belief that "a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years." *Colville*, 447 U.S. at 177 (Rehnquist, J., concurring). The requirement of unmistakable congressional authorization applied by the Tenth Circuit in this case is one of the few bright line standards in this area of the law. From the perspective of tax administration by the states and the perspective of business planning by the tribes, this bright line is both desirable and workable. The rule established by this Court provides a substantial level of predictability and certainty, and avoids the need for continuous and wasteful litigation.

Determining the legal incidence of a state tax will, in most cases, be much simpler than determining where the

ultimate economic burden of that tax may lie. For example, the Court held in *Blackfeet Tribe* that states may not impose severance taxes on a tribe's royalty interest in oil and gas, absent unmistakable congressional consent. The Commission would undermine that clear holding by permitting state taxation of a tribe's royalty interest if the tribe does not bear the economic burden of the tax. The Commission does not, however, suggest how economic burden is to be determined. Does the economic burden of a severance tax on coal fall on the mineral owner if market conditions allow some or all of the tax to be included in the price paid by a power plant which buys the coal? Similarly, does the economic burden of that same severance tax actually fall on the person who buys electricity from the utility that burned the coal, if an economist testifies that some or all of the severance tax is included in the utility's rates?

Who bears the legal incidence of a tax may not always be obvious but the vagaries of the market place are vastly more difficult to decipher. The rule proposed by the Commission would increase the level of uncertainty in this area of the law and diminish the central role of Congress in determining when a state may impose a tax directly on a tribe or tribal member for activity within Indian country.

The controlling effect of the legal incidence of a state tax under the *Blackfeet Tribe* principle also reflects the fact that taxes are not self-collecting. Taxes are typically enforced through civil and criminal proceedings against the taxpayer. This Court has noted the anomaly of a state claiming the authority to tax Indians within Indian country when the state has not been granted civil jurisdiction

over claims against Indians arising within Indian country. "Unless the state is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention, the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case." *McClanahan*, 411 U.S. at 179-180 (citation omitted). Oklahoma, like Arizona, has not obtained civil jurisdiction over Indians in Indian country pursuant to 28 U.S.C. § 1360. *See Sac and Fox*, 113 S. Ct. at 1992.

II. IF THE LEGAL INCIDENCE OF A STATE TAX FALLS ON NON-MEMBERS OF THE TRIBE, THE TAX IS NONETHELESS PREEMPTED IF THE STATE IS DIRECTLY TAXING "RESERVATION VALUE."

In the context of state taxation, the balancing of interests analysis applies only if the legal incidence of the state tax falls on a non-member of the tribe. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). A critical component of that balancing of interests is the concept of "reservation value." The Court has recently reaffirmed that state taxes which nominally fall on non-members of the tribe, but which implicate "value generated on the reservation by activities involving the Tribes," are markedly different from other state taxes which fall on non-members. *Milhelm Attea*, 114 S. Ct. at 2035.

States may validly impose a tax on non-Indian purchasers of goods which are merely imported by the tribe and resold within Indian country. *Colville*, 447 U.S. at

156-57. When, however, the state seeks to tax value generated within Indian country by activity in which the tribe plays a significant role, the balance shifts against state taxation, even if the tax nominally falls on a non-Indian. *Id.*; *Cabazon Band*, 480 U.S. at 216-21 (characterizing federal and tribal interests in establishing tribal gaming facilities as having "pre-emptive force"). Thus, in *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), the Tenth Circuit held Oklahoma could not impose its sales tax on the non-Indian customers of the Creek Nation's bingo enterprise. The Tenth Circuit correctly distinguished *Moe* and *Colville* on the grounds that those cases dealt with the sale of imported goods where the tribes had added no significant value to the goods. The court found that the activity being taxed by Oklahoma, *i.e.*, the entertainment offered by Creek Nation Bingo, was a "product" that was "wholly created, sold and consumed within the boundaries of Creek Nation lands." 829 F.2d at 986. Because the state sales tax was directed at "on-reservation value" the court held that Oklahoma could not impose its sales tax on the non-Indian customers of Creek Nation Bingo. 829 F.2d at 987.

Indian Country, U.S.A. relied heavily on this Court's decisions in *Colville* and *Cabazon Band* which protected reservation-generated value from state taxes and regulation. The Ninth Circuit has interpreted and applied *Colville* and *Cabazon Band* in the same manner as the Tenth Circuit. *See Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1409-11 (9th Cir. 1992) (state taxes on a non-Indian company implicate reservation value where the tribe played an active role in developing, operating and

regulating a marina and related recreational facilities in conjunction with non-Indian partners).

In the present case, the Commission improperly attempts to apply the reservation value concept to a tax whose legal incidence is on the tribe. However, even if the legal incidence of the taxes here were on non-Indians, the Commission's application of the reservation value test is flawed in two basic respects. First, it argues the state is not taxing reservation value as long as the state spends its tax revenues outside of Indian country. Pet. Br. at 6, 13, 28. Second, the Commission argues that the existence of reservation value turns simply on whether a product purchased from a tribe within Indian country is subsequently exported from Indian country. Pet. Br. at 12, 27-28.

Where and how the state spends its tax revenues is simply not relevant to the issue of whether the tax is being imposed on reservation value. This Court developed the concept of reservation value as a way to determine whether the tribe is an active participant in creating the underlying economic value (apart from the value of any tax exemption) of the goods or services the state seeks to tax. Surely a state should not be permitted to support taxing value generated by the tribe within Indian country on the grounds that the state spends all of the collected taxes outside of Indian country.

Neither should use of a product outside of Indian country provide proof that the product does not constitute reservation value for the purposes of all possible taxes related to that product. For example, if a tribal enterprise manufactures and sells furniture within its reservation, that enterprise surely is generating reservation value. *See New Mexico v. Mescalero Apache Tribe*, 462

U.S. 324, 343 (1983); *Cabazon Band*, 480 U.S. at 219-20. The mere fact that a non-Indian who buys that furniture on the reservation from the tribal enterprise subsequently uses the furniture in his home off of the reservation should not justify a state tax on the on-reservation sale of the furniture. Whether the tax is imposed on the tribal seller or on the non-Indian buyer, the tax would be imposed directly on reservation value. In that circumstance, the rationale of *Cabazon Band* would preclude state taxation.

On the other hand, the reservation value concept would not preclude a state from applying a nondiscriminatory personal property tax to a person who bought furniture from the tribal enterprise and subsequently held it at a location outside of Indian country on the assessment date. Notwithstanding the arguments put forth by the Commission, the concept of reservation value requires careful analysis of precisely what the state is attempting to tax and whether the value of that taxable thing or event was generated within Indian country with the participation of the tribe. The mere fact that a product purchased within Indian country is subsequently used outside of Indian country does not concern the question of reservation value.

In the context of motor fuel taxes, the reservation value concept requires careful analysis of precisely what the state is taxing: manufacture of motor fuel, wholesale distribution of motor fuel, retail sale of motor fuel, consumer use of motor fuel, or some other event. The Tenth Circuit concluded that Oklahoma has chosen to tax the retail sale of motor fuel. The Tenth Circuit therefore correctly did not reach the question of reservation value,

because the legal incidence of the Oklahoma tax is on the tribe, not on a non-Indian. If this Court reverses the Tenth Circuit on the question of where the legal incidence of the state tax lies, the reservation value concept will be relevant to the extent non-members of the tribe buy motor fuel in Indian country, and will require a determination of whether a tax on that retail sales transaction amounts to a tax on value generated within Indian country. The mere fact that some or all of the fuel sold by the tribe at retail within Indian country is subsequently used outside of Indian country is irrelevant to whether the value of the activity the state chose to tax (the retail sale of motor fuel) was generated within Indian country. This Court should reject the Commission's attempt to ignore the significance of reservation-generated value simply because the product of reservation activity is used outside of Indian country.

III. THE HAYDEN-CARTWRIGHT ACT DOES NOT AUTHORIZE THE IMPOSITION OF ANY TAX ON AN INDIAN TRIBE.

A. The Applicability of the Hayden-Cartwright Act Was Not Raised Previously and Is Not Properly Before This Court.

The Commission failed to raise below the Hayden-Cartwright Act, *see* 31 F.3d at 972 n.4, and did not mention this law in its Petition for Writ of Certiorari. This Court has not decided the question of whether the Hayden-Cartwright Act even applies generally on Indian reservations, much less authorizes taxes to be imposed by states directly on Indian tribes or their enterprises.

Bracker, 448 U.S. at 151 n.16.[3] The question of whether the Hayden-Cartwright Act authorizes Oklahoma to impose its gasoline excise tax on the Chickasaw Nation is not properly before this Court, and should not be addressed in this proceeding. *See Benten v. Kessler*, 505 U.S. ___, 112 S. Ct. 2929 (1992) (*per curiam*); *Miree v. DeKalb County*, 433 U.S. 25, 33-34 (1977) (per Rehnquist, J.); *Hagen v. Utah*, 510 U.S. ___, 114 S. Ct. 958, 964-65 (1994).

B. The Hayden-Cartwright Act Expresses No Congressional Authorization for States to Tax Tribes or Tribal Members in Indian Country.

If the Court does consider the applicability of the Hayden-Cartwright Act here, it must reject the Commission's position. As shown above, a state may tax Indian tribes or tribal members operating in Indian country only if there is an "unmistakably clear" expression of congressional authority. *County of Yakima*, 502 U.S. at 258; *Blackfeet Tribe*, 471 U.S. at 765; *Bryan*, 426 U.S. at 375-76 & n.2. No such expression is found in the Hayden-Cartwright Act.

Section 10 of the Hayden-Cartwright Act, authorizing state taxation in federal reservations, does not mention state taxation of tribes, much less explicitly authorize it. *See* 4 U.S.C. § 104. Indian tribes are not mentioned once in that section or its legislative history. When Congress

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[3] The only reported case of the court of appeals that deals with this issue directly is *Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987) (holding that 4 U.S.C. § 104 "does not support the imposition of the state's motor fuel tax on the Marty Indian School," citing *Bracker*).

passed the Act in 1936, state tax laws could not reach reservation Indians as a matter of constitutional law. *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 18 L.Ed. 667 (1866); *see McClanahan*, 411 U.S. at 169.

The only statutory language in the Hayden-Cartwright Act that is even remotely relevant to state taxation of tribes are the phrases "military or other reservations" and "licensed traders." 4 U.S.C. § 104(a). Neither phrase provides anything close to an "unmistakably clear" expression by Congress that states may impose taxes on Indian *tribes*.[4] *See Bryan*, 426 U.S. at 381 (A statute granting civil jurisdiction to the States in Indian country does not allow states to tax Indian property in light of the "total absence of mention or discussion

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[4] The two administrative opinions relied on by the Commission do not address the issue of whether the Hayden-Cartwright Act subjects tribes to state taxes, and could not supply the "unmistakably clear" statutory language even if they had. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 768 n.7 (1985). There is no evidence that these obscure opinions were brought to the attention of Congress, at any rate, and Congress' failure to amend the act in response to them has no persuasive value. *See generally United States v. Board of Comm'rs of Sheffield County, Alabama*, 435 U.S. 110, 134-35 (1978) ("When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation . . . [However,] it is impermissible to draw inferences of approval from the unexplained inaction of Congress . . . ."). *Cf. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. ___, 114 S. Ct. 1439, 1452-53 (1994) (refusing to impute congressional acquiescence in judicial construction of provision of securities laws by Congress' failure to amend provision in securities law while amending the securities laws in other respects, although all eleven of the courts of appeals had embraced that construction).

regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations."); *Blackfeet Tribe*, 471 U.S. at 766-67 (State taxation of tribe's royalty share of oil and gas is not authorized by 1938 act of Congress, where "[n]othing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to that Act. The statute contains no explicit consent to state taxation [of Indian tribes]."); *County of Yakima*, 502 U.S. at 267-70 (In light of principles of statutory construction "deeply rooted in this Court's Indian jurisprudence," the Court rejects a construction of the Burke Act, allowing state "taxation of . . . land" after the trust period expired, to also authorize taxation of the proceeds from the sale of that land.).

In this case, of course, the Hayden-Cartwright Act does not even suggest that states may tax tribes, and, indeed, there is ample reason to believe that Congress did not intend to include nontaxable Indian lands as within the statute. *See Bracker*, 448 U.S. at 151 n.16. However, even if there were some ambiguity in the legislation, this case is a most appropriate one for application of the canons of statutory construction that favor tribal tax immunities and that have near constitutional force. *See Blackfeet Tribe*, 471 U.S. at 766; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 412-17 (1993).

The text of 4 U.S.C. § 104 makes clear that Congress was concerned with motor fuel sales by federal agencies to federal employees and to the general public for their

private use. Congress intended to preclude the argument that motor fuel was beyond a state's taxing authority simply because it was purchased from a federal agency at a location within a federal reservation. There is no indication in the language of the statute or in its legislative history that Congress also intended to remove obstacles to state taxation that were based on considerations other than the federal governmental status of the seller. When the obstacle to state taxation is based on some other factor, such as the Indian status of the seller or the purchaser of the fuel, the Hayden-Cartwright Act simply has no application. The legislative history and related legislation discussed below demonstrate that to the extent Congress gave any thought at all to "licensed traders" the concern was sales by non-Indian traders to non-Indian customers from outside the reservation.

In other sections of the Hayden-Cartwright Act, Congress distinguished "nontaxable Indian lands" from "other Federal reservations" and dealt with them separately. Act of June 16, 1936, ch. 582, §§ 3, 6, 49 Stat. 1519, 1520-21. Hearings on the bill support the view that Indian lands were not within the purview of section 10 of that bill, which became 4 U.S.C. § 104.[5] That section was plainly directed at federal agencies and licensees, requiring "the officer in charge of such reservation" to submit

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[5] *See, e.g., Hearings Before the House Comm. on Roads on H.R. 11687,* 74th Cong., 2d Sess. 118 (1936) (Representative Whittington argues that sections of the bill appropriating money for roads on Indian reservations should not be included, as follows: "I have no sort of disposition not to want to help out on Indian work; but this bill deals primarily with the public roads, in every State in the Union. It deals with highways.").

reports showing "motor fuel not sold for the exclusive use of the United States." *Id.*, § 10(b), 49 Stat. at 1522.

Subsequent amendments to section 10 of the Hayden-Cartwright Act confirm the view that it was intended to apply to purely federal agencies and licensees, but not to Indians doing business in Indian country. The legislative history of the Buck Act, which continued tax exemptions for tribal Indians and made minor changes to section 10 of the Hayden-Cartwright Act, shows Congress' clear understanding that Indians and Indian tribes were generally exempt from *all* state taxes.

Indians and Indian lands were not mentioned in the original Buck Act bill, H.R. 6687. 84 Cong. Rec. 10,094 (1939). The bill did contain the phrase – as did the Hayden-Cartwright Act – "military and other reservations." *Id.* Even so, the bill was *not* intended to include Indian reservations.

> The bill presents a serious question as to whether it would authorize the levy of State sales and other taxes on transactions within Indian reservations. *We have been advised by the office of the Senate legislative counsel that it is not intended to apply to such transactions and will not be so construed.*

Letter from Acting Secretary of the Interior to Hon. Pat Harrison (Aug. 1, 1939), *reprinted in* 84 Cong. Rec. 10,685 (1939) (emphasis added). Nonetheless, the Department of the Interior sought to avoid any possibility that the legislation would be misconstrued, and sought to exclude

explicitly "Indian reservations" from the coverage of the bill.[6] *Id.* Senator LaFollette proposed such an amendment. 84 Cong. Rec. 10,907 (1939) (proposing an amendment to exempt "any transaction occurring in whole or in part within an Indian reservation").

In hearings on H.R. 6687, New Mexico objected to Senator LaFollette's proposed amendment. *Hearing Before a Subcomm. of the Senate Comm. on Finance on H.R. 6687*, 76th Cong., 3d Sess. 2 (1940) ("*Hearing*"). The objection, however, sought in no way to abrogate the historic tax immunities of Indians and Indian tribes, but to prevent *non-Indians* from moving their stores to Indian lands to avoid state taxes. *Id.* at 19. New Mexico Representative Dempsey, on behalf of the New Mexico Governor, readily acknowledged that Indians were "exempt from taxation" and that New Mexico had "no objection whatsoever to prohibiting the sales tax applying to Indians." *Id.*

The Interior Department continued to seek a blanket "reservation" exemption which would have applied to both non-Indian and Indian vendors and consumers. *Id.* at 38-40. Senator George suggested that the Interior officials confer with the State authorities to arrive at acceptable language. *Id.* at 40. The Committee ultimately reported out the bill with language consistent with New Mexico's position, as urged by Representative Dempsey,

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[6] Between 1936, when the Hayden-Cartwright Act was passed, and 1939, when the Buck Act bill was introduced, the "federal instrumentality" doctrine for nontaxable Indian lands was put in doubt by *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938). *See Felix S. Cohen's Handbook of Federal Indian Law* 421 n.145 (R. Strickland ed. 1982).

that "any tax on or from any Indian not otherwise taxed" would continue to be preempted. S. Rep. No. 1625, 76th Cong., 3d Sess. 4 (1940). The Committee amendment was enacted *verbatim* and is codified at 4 U.S.C. § 109.[7]

Nothing in the Buck Act or its legislative history even remotely suggests that Congress was jealously protecting the tax immunities of tribal Indians in only a limited way. To the contrary, Congress was continuing "[t]he policy of leaving Indians free from state jurisdiction and control," a policy "deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945).

Moreover, it is clear that Congress understood that the Buck Act's tax exemptions for tribal Indians in Indian country were coextensive with those of the earlier Hayden-Cartwright Act, where Indians are not even mentioned. This closely related legislation should be read *in pari materia*. *See McClanahan*, 411 U.S. at 176 (characterizing 4 U.S.C. § 104 as part of the Buck Act); *see generally Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

As Representative Buck stated, his bill was

> intended to provide that sales made within the Federal area shall be subject to the State sales taxes. We have already specifically granted the privilege to a State to tax gasoline sold within those areas, and it is proposed to extend this privilege to other sales.

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[7] Section 5 of the Buck Act, as signed into law, read "Nothing in sections 1 and 2 of this act shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." Act of Oct. 9, 1940, ch. 787, 54 Stat. 1059, 1060.

84 Cong. Rec. 10,093-94 (1939). In subsequent hearings, Representative Buck reiterated the intent of the legislation, stating "under section 10 of the Hayden-Cartwright Act, provision was made for the collection of motor-vehicle-fuel taxes within the federal reservations, and really this [bill] is only an extension of the principle involved in that act . . . ." *Hearing* at 4. Amendments to the Buck Act bill were justified "so that the authority granted to the States by [section 10 of the Hayden-Cartwright Act, 4 U.S.C. § 104] will more nearly conform to the authority granted to them under section 1 of this act." S. Rep. No. 1625, 76th Cong. 3d Sess. 5 (1940).

Clearly, Congress had no desire to differentiate between the treatment of sales taxes under the Buck Act from that of fuel taxes under the Hayden-Cartwright Act. Rather, Congress attempted to make the exemptions totally consistent, and all of the legislative materials show that the unstated assumption in 1936 that states could not tax Indians in Indian country was explicitly expressed in the Buck Act in 1940. The sole concern related to "licensed traders" was the evasion of state taxes by non-Indian vendors.

In the original drafting of the Buck Act, Indian reservations and other nontaxable Indian lands were simply assumed not to be within the "other reservations" with which the bill was concerned. *See* discussion *supra* at 19-20. Although the phrase "licensed traders" appeared in the Hayden-Cartwright Act, Congress knew that all of these people were non-Indians, and simply foreclosed a potential loophole by which *non-Indians* could move their businesses to Indian country and, by that simple expedient, avoid lawful state taxes. *See Hearing* at 19:

Mr. Dempsey. * * *

As I say, we have no desire to tax the Indians. They are exempt from taxation in our State, but we do not believe that because a man establishes a store on Indian lands competing with a store outside, the store inside should be exempt from all taxation, and the store outside should pay.

Senator Brown. Does the Indian who runs a store pay taxes?

Mr. Dempsey. The Indian does not run the store. The proprietors of the stores are whites, and not Indians . . . *I do not know of a single instance of an Indian owner of a store on an Indian reservation.*

Senator Brown. But if he did run a store, he would be subject to the same sales tax as levied by the State upon a white storekeeper?

Mr. Dempsey. *If an Indian operated a store outside of the reservation he would then be required to pay the sales tax, which is 2 percent, as are all other owners of stores in New Mexico. If, however, he has a store on Indian land, notwithstanding that he can sell anything in that store that he desires to sell, not Indian crafts, but foodstuffs, or anything of that kind, he is exempt.*

Senator Brown. *On sales to anybody?*

Mr. Dempsey. *To anybody.*[8]

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[8] As noted above, it was Representative Dempsey's position on the Indian tax exemptions that was ultimately embraced in the Buck Act.

Id. (emphasis added) The fact that 4 U.S.C. § 109 explicitly exempts "Indians not otherwise taxed"[9] only from what is now 4 U.S.C. §§ 105-106 (and not 4 U.S.C. § 104) is not the product of any congressional design, but only a result of "literal reenactment of the code," as the Legislative Reference Service of the Library of Congress took pains to point out in the codification of Title 4 of the United States Code. *See* S. Rep. No. 659, 80th Cong., 1st Sess. 9 (1947):

> One matter, however, might be noted. Section 108 of H.R. 1566 insures the retention of jurisdiction of the United States over Federal areas affected by the provisions in sections 105-110 dealing with State and Federal taxation in such areas. Section 109 provides that nothing in certain stated provisions permitting taxation in such areas shall be construed to authorize the collection of taxes from Indians not otherwise taxed. Section 110 defines certain terms with respect to the same problem of taxation. Section 108, however, refers only to sections 105-110; section 109 refers only to sections 105, 106; and section 110 refers only to sections 105-109. Yet section 104 deals also with gasoline taxes in Federal areas. Consequently the enactment into positive law of these various provisions could perhaps give rise to the contention that the exclusion of section 104 from the provisions of sections 108, 109, and 110 had some purpose not actually intended. This ambiguity is the result of the literal reenactment of the code.

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[9] In 1934, the phrase "Indians not taxed" was understood to mean "Indians resident on reservations, that is, on land not taxed by the state." William G. Rice, Jr., *The Position of the American Indian in the United States*, 16 J. of Soc. of Comp. Leg. (3d ser.) 78 (1934).

Reports explaining subsequent amendments to the Hayden-Cartwright Act tend to confirm the view that it was intended to apply not to nontaxable Indian land, but to purely federal enclaves. *See* H.R. Rep. No. 2515, 84th Cong., 2d Sess. 1 (1956) (4 U.S.C. § 104 "provides that taxes levied by the States and Territories on sales of gasoline may be levied with respect to such sales made by post exchanges, commissaries, and similar outlets located on Federal military reservations . . . ."); H.R. Rep. No. 2695, 84th Cong., 2d Sess. 1 (1956) (legislation to amend 4 U.S.C. § 104 would place "Guam on a basis of equality with the States and Alaska and Hawaii in authorizing the government of Guam to collect gasoline taxes on motor fuel sold on military posts, PX's and the like for nonmilitary use.").

The Hayden-Cartwright Act was never intended to abrogate the historic tax immunities enjoyed by Indians in their Indian country. It certainly does not provide "unmistakably clear" language showing a congressional intent to do so.[10]

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[10] It would be most ironic if the Hayden-Cartwright Act were used to justify state taxes in Chickasaw (or, for that matter, Navajo) country. That act sought to establish a federal/state partnership in road construction and maintenance, and assumed that states would expend the taxes allowed under the act throughout the state. It followed an earlier (1934) Hayden-Cartwright Act that sought to prevent states from diverting highway funds to other uses. Act of June 18, 1934, ch. 586, 48 Stat. 993. Here, by contrast, "*[a]ll* of the road mileage maintained by the state is off Indian country." Pet. Br. at 28 (emphasis added), quoting factual findings made by the District Court.

CONCLUSION

The policy of leaving Indian tribes and tribal members free from state jurisdiction and control was not breached by Congress in the Buck Act or the Hayden-Cartwright Act. This historic policy and the clear statement rule effectuating it are grounded firmly in the Constitution. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 408-17 (1993). Thus, even if Indian tax exemptions might "possibly embarrass the finances of a state or one of its subdivisions," that is a matter "for consideration of Congress, not the courts." *Board of Comm'rs of Creek County v. Seber*, 318 U.S. 705, 718 (1943). *See Marshalling Past and Present*, 107 Harv. L. Rev. at 428.

The attempt by the Commission to have this Court stray from the constitutional foundations of its Indian jurisprudence is particularly unappealing in this case, since not even an act of Congress is required to solve its perceived problem. All Oklahoma needs to do is clarify its tax laws in minor ways.

The Court of Appeals properly recognized the structural and constitutional values at stake here. It properly respected the "tradition of Indian sovereignty." 31 F.3d at 972. If, indeed, the legal incidence of the Oklahoma's tax is on a tribal entity, the taxes are preempted. If it is not, the case should be remanded with instructions to determine if the Chickasaw Nation is merely marketing a tax exemption or is creating and marketing reservation-generated value.

Because of the deference properly afforded to the construction of state statutes by the courts of appeals and because the Tenth Circuit reasonably construed Oklahoma's tax laws as being imposed on the tribal retailer, the decision below should be affirmed.

Respectfully submitted,

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